Supreme Court, U.S.
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No. 96-6

In The

Supreme Court of the United States

October Term, 1995

WILKINSON AND MONAGHAN, A PROFESSIONAL CORPORATION AND BILL V. WILKINSON,

Petitioners,

v.

HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, JERRY PULS, M.D., DOUGLAS HUBNER, M.D., JERRY L. PULS, M.D., INC., AND SOUTH UTICA PATHOLOGY LABORATORIES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The State Of Oklahoma Division IV

REPLY BRIEF

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I. INTRODUCTION

Petitioners Wilkinson and Monaghan and Bill V. Wilkinson submit this brief in reply to the brief of both the Pathologist Respondents and the Hillcrest Respondents in opposition to the petition for certiorari in this matter.

II. ARGUMENT

A. PETITIONERS PROPERLY RAISED THE DUE PROCESS ISSUE BELOW

In their petition, Petitioners explained in detail how the issues of both the trial judge's lack of neutrality and the resulting violation of petitioners' due process rights had been raised in the courts below. *See* Petition for Writ of Certiorari, at pp. 8-13. Completely ignoring this description, both Respondents cryptically assert that the due process issue was not presented. Because this question was fully discussed in the Petition, Petitioners will rely on that discussion.[1]

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[1] One further point should be noted. The Respondent Pathologists assert that Petitioners failed to comply with the state law procedural requirements for raising constitutional issues. Respondent Pathologists' Brief in Opposition, at 5-6. Assuming, solely for purposes of argument, the accuracy of this assertion, the fact remains that at no point did the state courts below decline to adjudicate the due process issue because of such lack of compliance. The Petitioners' alleged lack of compliance with such requirements, then, cannot serve as an independent and adequate state ground for this Court's refusal to adjudicate Petitioners' due process claim.

B. RESPONDENTS CONSTRUE THIS COURT'S DUE PROCESS PRECEDENTS IN AN UNDULY NARROW MANNER

In their Petition for Certiorari, Petitioners argued that the due process right to an independent adjudicator fashioned in such cases as *In re Murchison*, 349 U.S. 133 (1955), and *Tumey v. State of Ohio*, 273 U.S. 510 (1927), dictates that the trial judge who had previously determined essential issues of law directly related to sanctions sought to be imposed on an attorney could not himself impose those sanctions. While concededly none of this Court's precedents shaping the right to a neutral adjudicator has dealt directly with the issue of attorney sanctions, Petitioners argued that both the logic and rationale of those decisions were directly applicable in the attorney sanctions context. Respondents have sought to attack this argument, by characterizing this Court's due process precedents in an absurdly narrow manner. In so doing, they have missed the point both of this Court's decisions and the important constitutional values served by the right to a neutral adjudicator.[2]

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[2] In addition to their mischaracterization of this Court's due process precedents, the Respondent Pathologists incorrectly attempt to place the law of Oklahoma above the Fourteenth Amendment's Due Process Clause, by relying on the power given to trial courts pursuant to state law. Respondent Pathologists' Brief in Opposition, at 16-18. However, if the Due Process Clause prohibits a particular result, the fact that such a result is authorized by state law is of course completely irrelevant. A contrary conclusion would violate basic notions of the supremacy of federal law. *See*, U.S. Const. Art. VI, cl. 2; *Testa v. Katt*, 330 U.S. 386 (1947).

Contrary to Respondents' contentions, *Murchison* was considerably more than a case about a judge who conducted a secret "judge-grand jury" proceeding. Rather, *Murchison* has been widely relied upon in later decisions of both this Court and lower courts for the proposition that absent an emergency situation, a judge who is the victim of contempt may not adjudicate and punish that contempt. *See*, Sedler, *The Summary Contempt Power and the Constitution: The View From Without and Within*, 51 N.Y.U. L. Rev. 34 (1976). This conclusion is based on the simple but compelling premise that a judge in such a position cannot be assumed to have the neutral perspective required by the concept of fair adjudication.

Similarly, Respondents' attempt to characterize this Court's decision in *Tumey* as concerned with nothing more than the issue of pecuniary interest misses the point of that decision. To be sure, the presence of a pecuniary interest, as in *Tumey*, will violate the constitutional right to a neutral adjudicator. But while the presence of a pecuniary interest constitutes a *sufficient* grounds for violation of due process, it has never been suggested that it is a *necessary* condition. Indeed, the contempt cases, such as *Murchison*, conclusively demonstrate that the right to a neutral adjudicator may be violated, even absent the existence of a pecuniary interest. The concern of this Court in *Tumey*, in the opinion's own words, was the avoidance of any "possible temptation to the average man as a judge. . . ." 273 U.S. at 532. Surely, this category includes far more than merely the presence of a pecuniary interest.

Further indication that the presence of a pecuniary interest is not a prerequisite to the triggering of the neutral adjudicator requirement appears in this Court's

decision in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). There this Court held that the State Attorney General who was actively in charge of an investigation could not sit as the final arbiter of the existence of probable cause for a search: "Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule [that a showing of probable cause is required] is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigation. . . ." 403 U.S. at 450. Surely, there was no reason to think the Attorney General had a pecuniary interest in the issuance of a search warrant, yet this Court nevertheless rightly found that he lacked the requisite neutrality to make such a determination.

C. A TRIAL JUDGE CALLED UPON TO REVIEW HIS OWN DECISIONS IS NOT A NEUTRAL ADJUDICATOR

The key point ignored by Respondents in their unduly truncated analysis of this Court's decisions is that in this case, as in those cases, it is unreasonable to expect the trial judge to possess the requisite neutrality in ruling upon the appropriateness of the sanctions issued against Petitioners. Just as no man can be a judge in his own case [*Dr. Bonham's Case*, 77 Eng. Reg. 646, 8 Coke 114a (c.p. 1610)], so, too, is a judge incapable of neutrally sitting in judgment on the correctness of his own decision.[3] This is because, in the words of a leading scholar:

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[3] It is true, of course, that trial judges are in a position effectively to review their earlier rulings pursuant to motions for a new trial. *See* Fed. R. Civ. P. 59. The availability of such motions, however, in no way avoids the availability of or need

> The judge responsible for making primary decisions must necessarily make a heavy investment of time and interest in particular disputes and individuals that come before him; his limited perspective and his limited opportunity for reflection makes it impossible for him to coordinate successfully with his colleagues. Vanity and pride of opinion are additional obstacles; even very sensitive, intelligent, and self-disciplined judges must be troubled at times by their own involvement of ego.
>
> Carrington, *Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 551 (1969).

Moreover, "even if trial judges are capable of maintaining necessary objectivity, and their decisions are usually correct . . . preserving the appearance of justice in the eyes of the litigants who would otherwise view themselves as victims of arbitrary individuals is an equally important goal." Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 Colum. L. Rev. 89, 97 (1975). *See also Offutt v. United States*, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice.").

As explained in the Petition for Writ of Certiorari, the validity of the sanctions in this case turns entirely on the correctness of the trial Court's exclusion of key evidence proffered at trial by Petitioner Wilkinson. If that evidence

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for subsequent appellate review. Moreover, while normally the trial judge will satisfy the neutral adjudicator requirement when he rules initially, that is not true here, because at the time of the judge's initial ruling Petitioners had not yet been afforded a hearing.

had been improperly excluded by the trial Court, the entire basis for the sanctions would have disappeared.[4]

At Petitioners' constitutionally required hearing, the final adjudicator was the very same individual who had previously ruled on the key question for decision. The decisional neutrality required by due process is clearly absent in such a situation.

D. THERE EXISTS AN IMPORTANT NEED FOR THIS COURT TO RECONCILE THE IMPOSITION OF ATTORNEY SANCTIONS WITH PROCEDURAL DUE PROCESS

In support of their assertions that the imposition of attorney sanctions by the trial judge does not violate due process, Respondents cite decisions of this Court in which such sanctions have been upheld. *See* Respondent Pathologists' Brief in Opposition, at 12-14. However, in none of these cases has this Court ever raised, much less given serious consideration to, the possible relevance of the due process right to a neutral adjudicator. This is an issue of enormous practical and theoretical importance, to which this Court has yet to devote any attention. The present case provides just such an opportunity. This case involves the largest sanction award against an attorney in Oklahoma and certainly involves one of the largest ever awarded in the United States. The procedural due process issue forming the basis of this Petition For Certiorari is

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[4] Contrary to the position taken by Respondents [Hillcrest Respondents' Brief in Opposition, at 20-26], the accuracy of the trial judge's ruling under the applicable state law of evidence is irrelevant to the issue before this Court.

best characterized by Attorney Wilkinson's plea to the District Judge before the sanction hearing:

> There are currently pending claims for fees and costs against the law firm in excess of $650,000. It would be in the best interest of everyone concerned for a completely neutral judge who has no background in this litigation to determine these important issues. As you can imagine, the determination of these issues is of vital importance to the law firm and may well mean, 'life or death' to the firm. Thus we want to insure that the adjudication process is completely objective. (Petitioners' Petition For Writ of Certiorari, p. 9.)

III. CONCLUSION

For the foregoing reasons, Petitioners respectfully ask this Court to grant their Writ of Certiorari.

Respectfully submitted,

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